IN THE HIGH COURT OF JUDICATURE AT BOMBAY

IN ITS INSOLVENCY JURISDICTION

NOTICE OF MOTION NO. 139 OF 2005
IN
NOTICE NO.N/9 OF 2005

Re: Shekhar Modi ...Judgment Debtor.

Ex-parte :
The Official Assignee. ... Judgment Creditor.

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Mr. Kishore Jain for the Judgment Creditor.

Ms. Betty D'souza for the Judgment Debtor.

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CORAM : DR. D.Y. CHANDRACHUD,J.

05th DECEMBER 2006.

P.C. :

1. The Notice of Motion which forms the subject matter of these proceedings seeks an order of the Court setting aside an Insolvency Notice dated 20th January 2005. There is a delay of 210 days. In fairness, Counsel appearing on behalf of the Official Assignee has not opposed the condonation of delay. Sufficient cause is shown. The delay is accordingly condoned.

2. On the report of the Official Assignee dated 12th April 2002, an order was passed by this Court on 20th August 2002. By the order of the Court, the Judgment Debtor was directed to pay the charges of the Co-operative Society amounting to Rs.3,5,464/- upto July 2001 and to

pay the arrears of electricity charges due under a bill dated 14th February 2002. The Judgment Debtor is the spouse of Insolvent No.3. In paragraph 8 of the order, this Court had noted that in an affidavit filed by the Judgment Debtor himself in the Insolvency proceeding, he had stated that he was in personal and exclusive possession of the flat for over 10 years without any break.

3. In an appeal arising out of the order of this Court dated 20th August 2002, a Division Bench by its order dated 22nd December 2002 recorded the undertaking of the Judgment Debtor to deposit an amount of Rs.3.00 lacs with the Official Assignee in four instalments within a period of 16 weeks. The Division Bench which admitted the appeal however, observed that in the event that the Judgment Debtor herein did not deposit the aforesaid amount as directed, the Appeal shall stand dismissed without further reference to the Court. There is no dispute about the factual position that the undertaking to deposit has not been complied with. The order of the Court dated 20th August 2002 is essentially an order passed with reference to the provisions of Section 36 of the Presidency Towns Insolvency Act, 1909 and under sub-Section 1 of Section 36, the Court is empowered upon an order of adjudication to summon inter-alia any person known or suspected to have in his possession any property belonging to the Insolvent. Based on a failure of compliance with the directions

contained in the order dated 2nd December 2002, the Official Assignee took out an Insolvency Notice.

4. Counsel appearing on behalf of the Judgment Debtor submits that the Insolvency Notice should be set aside since the Appeal that was filed against the order dated 20th August 2002 is still pending. The order of the Division Bench dated 2nd December 2002 provides that in the event that an amount of Rs.3.00 lacs as was undertaken to be deposited is not deposited by the Judgment Debtor, the Appeal would stand dismissed.

5. On behalf of the Judgment Debtor, it has been submitted that an order of deposit cannot be passed as a condition for the admission of an Appeal. The submission cannot be accepted for more than one reason. First and foremost, the Judgment Debtor tendered an undertaking before the Division Bench of which there is a breach. That apart, it is manifestly not within the jurisdiction of a Single Judge to allow any submission to be urged in regard to the correctness of an order of the Division Bench. Such a submission cannot possibly be urged before or entertained by a Single Judge.

6. The facts as they stand show that the order of this Court dated 20th August 2002 as well as the undertaking that was tendered before the Division Bench in Appeal on 2nd December 2002 have not been complied with.

7. In these circumstances, the application for setting aside the Insolvency Notice is lacking in merit and shall have to be dismissed.

8. No other point has been urged. The Notice of Motion is accordingly dismissed.